FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1877

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

HAROLD N. EVANSON, ET AL., UNITED STATES OF AMERICA, ET AL., AND THE HONORABLE EARL R. LARSON, UNITED STATES DISTRICT JUDGE,

Respondents.

On Petition For a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an order granting sanctions under Rule 37(b)(2), Federal Rules of Civil Procedure, for failure to provide discovery is appealable when the order is neither a final decision under 28 U.S.C. §1291 nor within any exception to the requirement of finality.

TABLE OF CONTENTS

Page

OPINIONS BELOW.....1

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....10

ARGUMENT.....12

TECA PROPERLY APPLIED THE STANDARDS OF COHEN AND ITS PROGENY IN DECIDING THE DISCOVERY ORDER WAS NOT COLLATERAL AND THUS NOT APPEALABLE

THE DECISION BY TECA IS CONSISTENT WITH THE PRINCIPLES ESPOUSED BY THE UNITED STATES SUPREME COURT AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE OTHER CIRCUITS

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases:

Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).....25

Cobbledick v. United States, 309 U.S. 323 (1940).....13

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).....passim

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).....15,17,18

Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974).....23

David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977).....24

Diaz v. Southern Drilling Corp. 427 F.2d 1118 (5th Cir.), cert. denied, 400 U.S. 878 (1970).....24

Dow Chemical Co. v. Taylor, 519 F.2d 352 (6th Cir.), cert. denied, 423 U.S. 1033 (1975).....23

In re the Attorney General of the United States, 596 F.2d 58 (2d Cir. 1979).....24

Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156 (2d Cir. 1976).....24

Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530 (2d Cir. 1978).....24

Marine Petroleum Co. v. Champlin Petroleum Co., ___ F.2d ___, No. 8-4 (Em.App. February 25, 1980).....15,21

Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833(1978).....25,26

United States v. Ryan, 402 U.S. 530 (1971)....20

Statutes:

United States Code
12 U.S.C. §1904, note.....12,16
15 U.S.C. §§751 et seq. 3,12
28 U.S.C. §1291.....2,12,21
28 U.S.C. §1292.....12

Regulations:

Code of Federal Regulations (39 Fed. Reg. 1924; January 15, 1974)
10 C.F.R. §212.31.....3
10 C.F.R. §212.81-88.....3
10 C.F.R. §212.82(a).....3
10 C.F.R. §212.82(f)(1)(i).....4
10 C.F.R. §212.82(f)(3).....4
10 C.F.R. §212.83.....4

Rules:

Federal Rules of Civil Procedure
Rule 37.....8,14,22
Rule 54.....22,25

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals dismissing the appeal and denying the requested writ of mandamus and

prohibition (Appendix B of Petition) is reported at 619 F.2d 72. The order entered by the District Court on December 14, 1979 (Appendix D of Petition) is reported at 85 F.R.D. 274.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition (Appendix E), Respondents rely upon the following statute:

> 28 U.S.C. §1291. Final decisions of district courts.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This lawsuit is a class action on behalf of certain retail dealers who purchased gasoline from Union. The suit alleges that Union violated the refiners' price rules,

10 C.F.R. §§212.81-.88,[1] enacted under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 et seq. Basically, the price rules require a refiner to make several determinations in calculating lawful selling prices for its regulated products. First, the refiner must determine its appropriate "class(es) of purchasers." 10 C.F.R. §212.82(a). A class of purchasers is defined as those customers who were paying a comparable price for a comparable product on May 15, 1973. 10 C.F.R. §212.31. Second, the refiner must determine a weighted average

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[1] All citations to 10 C.F.R. are to the regulations adopted by the Federal Energy Office on January 15, 1974 (39 Fed. Reg. 1924). The text of the cited regulations is set forth in Appendix E to the Petition, pp. A-2 to A-26.

price for each product for each class of purchaser. 10 C.F.R. §212.82(f)(1)(i). The weighted average price is determined for each class of purchaser by using actual transactions which occurred on May 15, 1973, id., or on the date imputed by the regulations. 10 C.F.R. §212.82(f)(3). The resulting weighted average price becomes the first component of the base selling price for that class of purchasers. The refiner is allowed to add increased costs incurred for crude petroleum after May 15, 1973, to the weighted average price when establishing the base selling price to each class of purchasers. 10 C.F.R. §212.82(f)(1)(i)(a); see generally 10 C.F.R. §212.83.

The suit was filed on December 31, 1975. On November 3, 1977, plaintiffs Harold

N. Evanson, et al. (the Respondents here), served their Second Set of Interrogatories to Union. Certain of those Interrogatories requested information on Union's determination of its May 15, 1973 weighted average prices as required by the refiner's price rules. Union requested and received a ninety-day extension of time within which to answer the Interrogatories. At the end of the extension, Union claimed it was unable to supply the answers to the Interrogatories regarding weighted average prices. Respondents objected to Union's insufficient answers. Union then requested an additional thirty days to supplement its answers, and the District Court so directed. In its supplemental answers, Union admitted it did not use the May 15, 1973 weighted average prices in establishing selling prices for

its retail class of purchasers. However, Union refused to answer the Interrogatories for any of its other classes of purchasers (jobber, commercial, wholesale). Respondents continued to pursue responsive answers from Union.

Following the breakdown of negotiations conducted between counsel as required by local rules for the District of Minnesota, Respondents moved the District Court to order Union to answer the Interrogatories fully. The Court so ordered. On March 1, 1979, Union filed supplementary answers to the Interrogatories which the Court had ordered Union to answer. For its commercial class of customers, Union claimed to have determined the May 15, 1973 weighted average price component of its selling prices by using two different methods of weight

averaging. In its supplementary answers, Union identified two separate computer reports which allegedly showed the prices determined by Union's two methods of weight averaging its May 15, 1973 selling prices.

After obtaining Union's supplementary answers, Respondents conducted a nation-wide investigation of Union's actual pricing activities for the relevant period. The results of that investigation led Respondents to believe Union's supplementary answers were false. Specifically, Respondents' investigation indicated Union had never used the weighted average prices shown on the identified computer reports to establish its selling prices. Respondents requested and received an order of the District Court setting an evidentiary hearing to take testimony and examine documents to determine

if the answers had indeed been falsified. The evidentiary hearing conclusively established that the Interrogatory answers were indeed false and were known to be false when given. Following the submission by all counsel of memoranda outlining their recommendations for what sanctions, if any, should be imposed, the District Court entered its order of December 14, 1979.

The order, issued under Rule 37(b)(2)(A), F.R.Civ.P., directed that for Union's failure to comply with the earlier order of the Court compelling discovery, certain facts would be taken as established. These facts, which are inextricably bound with the central issues of the lawsuit and which relate directly to the Interrogatories asked, were established to comport with the evidence presented at the evidentiary

hearing. The District Court ordered:

> The following facts will be deemed to be established for all purposes:
>
> 1. That defendant Union Oil Company of California knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.
>
> 2. That for all classes of customers defendant Union Oil Company of California did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.
>
> 3. That the responsible executives of Union Oil Company of California and therefore Union Oil Company of California itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.

85 F.R.D. at 278.

Union appealed the December 14, 1979 order to the Temporary Emergency Court of Appeals of the United States (TECA) on January 11, 1980. On January 21, 1980,

Respondents filed with TECA a motion to dismiss on the grounds the order was not appealable at that time. On January 30, 1980, Union filed a Memorandum in Opposition to Respondent's Motion to Dismiss. On April 7, 1980, TECA granted the Respondents' Motion to Dismiss.[2]

SUMMARY OF ARGUMENT

In its Petition, Union Oil Company of California (Union) has incorrectly set

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2 Upon dismissing the appeal, TECA considered Union's alternative petition for a writ of mandamus and prohibition. After a careful review of the actions taken by the district judge, TECA concluded there had not been a "usurpation of power or a clear abuse of discretion." 619 F.2d at 75. Union's petition was denied. Union has not clearly stated whether it seeks review of the denial. Thus, Respondents have not dealt further with this point.

forth the pertinent issues. The only issue properly before this Court is whether an interlocutory order granting sanctions for failure to comply with an order to provide discovery should be reviewed before the District Court has entered a final judgment. Union incorrectly devotes the major portion of its petition to the propriety of the sanction order. (Petition, pp. 8-14.) The propriety of the District Court's order is certainly reviewable, but only at the appropriate time.[3] As TECA correctly stated: "[t]he validity of the discovery sanctions

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[3] As Union's arguments concerning the appropriateness of the District Court's actions do not bear on the question of whether certiorari should be granted or denied, Respondents have not discussed them further.

can be questioned, along with any other issues in this proceeding, following a final decision." 619 F.2d at 74.

ARGUMENT

TECA PROPERLY APPLIED THE STANDARDS OF COHEN AND ITS PROGENY IN DECIDING THE DISCOVERY ORDER WAS NOT COLLATERAL AND THUS NOT APPEALABLE.

The Courts of Appeals[4] only have jurisdiction over an appeal from a District Court when a final decision has been made, 28 U.S.C. §1291.[5] The policy underlying

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4 TECA, with minor exceptions, has "the powers of a circuit court of appeals." Section 211(b)(1) of the Economic Stabilization Act of 1970, Pub.L. 92-210, 12 U.S.C. §1904, note as incorporated by Section 5 of the Emergency Petroleum Allocation Act of 1973, Pub.L. 93-159, 15 U.S.C. §754.

5 But see 28 U.S.C. §1292.

the requirement of finality is clear.

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. [Footnotes omitted]

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

There is no question here but that Union is attempting to appeal from a nonfinal order. Union seeks to escape the requirement of finality by alleging the sanction order to be within the exception created by this Court in Cohen v. Beneficial Indus. Loan

Corp., 337 U.S. 541 (1949).

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

The thirty-year history of Cohen has consistently shown the exception to be narrow. The exception has never been utilized to permit appellate intervention when, as here, the District Court has merely entered an order as permitted under Rule 37, F.R.Civ.P., which order is clearly integrated with the merits of the action and which will comprise a step "toward final disposition of the merits of the case and will . . . be merged in final judgment." Id.

The most recent United States Supreme Court case applying the Cohen doctrine was Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978):

> To come within the "small class" of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. (Footnotes and citations omitted.)

Id. at 468.

TECA clearly understands the principles of Cohen as enumerated in Coopers & Lybrand, and has demonstrated its ability to apply those principles to the facts of an order urged for appeal. See Marine Petroleum Co. v. Champlin Petroleum Co., ___ F.2d ___, No. 8-4 (Em.App. February 25, 1980) (analysis of the jurisdiction of TECA under

12 U.S.C. §1904 note, §211(b)). Union made the same Cohen exception argument in urging TECA to take jurisdiction of its appeal. TECA dealt squarely with the issue and decided the order was clearly not within the exception created by Cohen and its progeny:

> The sanctions ordered by the district judge under Rule 37 are not separable and collateral to the review of the case, as required by Cohen. The facts taken as proven go the merits of the case, and thus involve matters that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Moreover, the district court noted that it was not imposing sanctions relative to the intentional or willful nature of Union's conduct, although it might have done so under Rule 37, 85 F.R.D. at 278. The court left the door open for Union to assert affirmative defenses to the main action based upon bona fide error in calculating its selling prices. Thus, the order is not dispositive of all of Union's defenses that can be made in the district court.

(Citation omitted.)

619 F.2d at 74.

Union has characterized the order as conclusively determining the issue of willfulness. (Petition, pp. 17-18). While the sanction order does establish as proven certain facts regarding Union's actions, both the District Court and TECA noted that Union retained the opportunity to defend any allegations of willfulness or intent by proving their actions had been the result of a bona fide error. The order does not "conclusively determine the disputed question." Coopers, 437 U.S. at 468.

It is clear from the opinions of both the District Court and TECA that the sanction order does not "resolve an important issue completely separate from the merits of the action." Id. Indeed, the sanctioned facts

are entwined inseparably with the issues of the main action. The facts taken as proven go to the merits of the case. The facts relate directly to the interrogatories asked, and further comport with the true evidence which Union was compelled to produce at the evidentiary hearing.

Finally, it is clear the sanction order is not "effectively unreviewable on appeal from a final judgment" of the District Court, when entered. Id. The District Court has set this case for trial on September 3, 1980. Union need only wait until the resolution of that trial to obtain whatever review it feels is necessary of the sanction order. It would advance this litigation in no material fashion to conduct a piecemeal review at this time.

THE DECISION BY TECA IS CONSISTENT WITH THE PRINCIPLES ESPOUSED BY THE

UNITED STATES SUPREME COURT AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE OTHER CIRCUITS.

The only theoretically acceptable argument which Union presents in support of its Petition is that TECA's decision is in disagreement with decisions of this Court and the other circuit courts of appeals. Union has inappropriately focused its attention on cases examining the appealability of many different types of interlocutory orders. Union, in presenting its argument, has offered no analysis of the cases with respect to the different types of interlocutory orders involved. It is inappropriate to compare appellate or Supreme Court decisions on different types of interlocutory orders to the TECA decision here. To do so would be to compare apples to oranges. The proper analysis

is to deal with those decisions involving the appealability of discovery sanction orders. When this is done the alleged inconsistencies vanish.

Union can cite no Supreme Court case in the thirty-one year history of Cohen which would be inconsistent with the TECA decision here.[6]

TECA itself had never before squarely faced the issue presented by this case. TECA had previously reviewed the bounds

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6 United States v. Ryan, 402 U.S. 530 (1971), cited by Union, dealt with an entirely different context. The potential sanctions (contempt) envisioned by the Ryan court would indeed be reviewable, as they would be absolutely final and immediately executionable against Ryan if he failed to comply with the subpoena duces tecum.

of its appellate powers in Marine Petroleum Co. v. Champlin Petroleum Co., ____ F.2d ____, No. 8-4 (Em.App., February 25, 1980). In Marine, TECA determined that 28 U.S.C. §1291 et seq. applied to it and limited its appellate powers. TECA also determined that the Cohen decision was an integral part of its powers under 28 U.S.C. §1291, and expounded at length upon the standards of Cohen. In the instant case, TECA fairly examined those standards, and compared them with the challenged order. TECA correctly determined that the sanction order was not appealable. Union has not cited, and cannot cite, any case from TECA which would be inconsistent with that court's decision that this order, which granted sanctions for failure to comply with an order to provide discovery, is not appealable.

Union has misinterpreted the opinions of the other circuits which have ruled on the appealability of discovery sanction orders. There are certain sanctions which may be levied against a party failing to provide discovery which are indeed immediately reviewable. Rule 37, F.R.Civ.P., itself provides that a default judgment may be entered or certain claims of a party may be dismissed. It is clear that a default judgment would be immediately reviewable, as it would be a final determination of the case. A full dismissal of a plaintiff's claims would likewise be a final determination of the case. A dismissal of less than all claims, while normally not appealable without an order under Rule 54, F.R.Civ.P., could at least be a final determination of those claims, and might

be appealable under Cohen. Thus, those cases which in dicta have said that although a discovery order will not be reviewed, the imposition of sanctions would be reviewable, must be viewed as consistent with the limitations on the appellate court's jurisdiction. When the order for sanctions was presented to those courts, they should, and presumably would, apply the requirements of 28 U.S.C. §1291 and Cohen. See Dow Chemical Company v. Taylor, 519 F.2d 352 (6th Cir.), cert. denied, 423 U.S. 1033 (1975).

The preponderance of the cases actually dealing with discovery sanctions have been decided in total agreement with the requirements of 28 U.S.C. §1291 and Cohen. See Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974) (sanctions for failure to

answer Interrogatories, at least with respect to a party to litigation, represented neither collateral matter nor judgment which was final); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) (order appealable as final to a non-party); In re the Attorney General of the United States, 596 F.2d 58 (2d Cir. 1979) (contempt order nonappealable); Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156 (2d Cir. 1976) (sanction order dismissing claims against one firm not appealable in multi-party case) and 607 F.2d 530 (2d Cir. 1978) (appealable following final judgment).

Union cites Diaz v. Southern Drilling Corp., 427 F.2d 118 (5th Cir.), cert. denied, 400 U.S. 878 (1970) as an inconsistent decision. As Diaz involves a default

judgment, the order is clearly final as to the government-intervenor. While the order was issued in a multi-party lawsuit, and Rule 54(b), F.R.Civ.P. would normally make it non-final, the order was clearly collateral to the action between Diaz and Southern, and was certainly final within the meaning of Cohen.

The only case showing a conflict on its face is Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978). In a previous hearing on the case, Arthur Anderson & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied 429 U.S. 1096 (1977), the Tenth Circuit in dicta said while an order compelling production of documents was not appealable, a subsequent order imposing a harmful sanction would be reviewed. 546

F.2d at 342. In Ohio, the Tenth Circuit granted such a review.

It is noteworthy that the "harmful sanction" arose because Arthur Andersen would have been required to violate foreign law to comply with the order. Union faced no such threat. To answer truthfully, Union would only have had to reveal it had lied to the government over five years earlier during the conduct of an audit to gauge compliance with the price regulations.

The Ohio court merely made a blanket statement that the sanction order was reviewable under Cohen. There was no analysis of Cohen or its requirements as construed by the Supreme Court in later cases.

It is clear that if any conflict is presented between Ohio and the instant TECA

opinion, the conflict lies within Ohio and not within the decision of TECA. TECA has faithfully and correctly applied the standards of Cohen and its progeny. TECA's decision in this case is in accord with the decisions of the United States Supreme Court and the decisions of the circuit courts of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Dated: July 14, 1980